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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GABRIEL LOUIS HERNANDEZ, Defendant and Appellant.	E064823 (Super.Ct.No. FCH02040) OPINION

APPEAL from the Superior Court of San Bernardino County. Michael A. Smith, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton, and Karl T. Terp, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant Gabriel Louis Hernandez appeals the denial of his petition for recall of his "three strikes" sentence pursuant to Proposition 36 (Pen. Code, § 1170.126).[1] Defendant contends the trial court abused its discretion in finding that resentencing him would pose an unreasonable risk of danger to public safety under section 1170.126, subdivision (f). Defendant argues the Proposition 47[2] definition of unreasonable danger applies to Proposition 36. We reject defendant's contentions and affirm the trial court order denying defendant's Proposition 36 petition for resentencing.

II

FACTUAL AND PROCEDURAL BACKGROUND

In 1997, a jury found defendant guilty of corporal injury to a spouse (§ 273.5, subd. (a); count 1) and possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a); count 2). The court sentenced defendant to 25 years to life on both counts, for a total term of 50 years to life in prison. In a bifurcated trial, the jury also found true allegations defendant had prior felony convictions for robbery in 1981 and armed robbery in 1982. (§§ 211, 667, 18 U.S.C. 2113(a)(d)).

On June 3, 2014, defendant filed a petition for resentencing under Proposition 36 (§ 1170.126). Defendant asserted that his current offenses were not serious or violent

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[1] Unless otherwise noted, all statutory references are to the Penal Code.

[2] The Safe Neighborhoods and Schools Act, approved by the electorate on November 4, 2014 (§ 1170.18).

felonies under sections 667.5, subdivision (c), or 1192.7, subdivision (c). Also, his current sentence was not imposed for any disqualifying offenses enumerated in section 1170.126, subdivision (e)(2). Defendant further maintained that resentencing him under Proposition 36 would not pose an unreasonable risk of danger to public safety (§ 1170.126, subd. (f)). The People filed opposition to defendant's petition. The People argued section 1170.126 prohibits resentencing if a defendant has a conviction for use of a firearm. The People also argued defendant posed an unreasonable risk of danger to the community.

On October 30, 2015, the trial court heard defendant's Proposition 36 resentencing petition. After considering defendant's criminal history and prison disciplinary record and hearing oral argument, the trial court denied defendant's petition on the ground defendant poses an unreasonable risk of danger to public safety. However, as to count 2, the court resentenced defendant pursuant to an oral motion to resentence him under Proposition 47.

Accordingly, defendant remains sentenced to 25 years to life on count 1. The trial court ordered defendant's conviction on count 2 reduced to a misdemeanor and resentenced defendant solely on count 2 under Proposition 47, to a one-year concurrent term, with 180 days credit and 180 days to be served in jail. Defendant filed a notice of appeal of the trial court's ruling denying his Proposition 36 petition.

III

"UNREASONABLE RISK OF DANGER" STANDARD

Defendant contends the trial court applied the wrong standard when it made its

finding under section 1170.126 that defendant would present an unreasonable risk of danger to public safety. Defendant argues the trial court should have applied the standard in Proposition 47, which "clarified" Proposition 36's definition of "an unreasonable risk of danger to public safety" to mean "an unreasonable risk that the petitioner will commit a new violent felony" as defined by the Three Strikes Law. (§ 1170.18, subd. (c).) We disagree. The Proposition 47 definition of "an unreasonable risk of danger to public safety" does not apply to resentencing under Proposition 36.

The issue of whether to apply the Proposition 47 standard to Proposition 36 resentencing is currently pending before the Supreme Court.[3] We agree with the view Proposition 47's definition of "unreasonable risk to public safety" does not apply to Proposition 36 petitions for resentencing. Proposition 47 redesignates certain offenses that previously were felonies or "wobblers" as misdemeanors. It creates a new resentencing provision which allows qualified defendants to request resentencing in accordance with its provisions. (§ 1170.18, subd. (c).) Proposition 47 provides that "[a]s used throughout this Code, 'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony [super strike] within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e)

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3 See, e.g., *People v. Chaney* (2014) 231 Cal.App.4th 1391, review granted February 18, 2015, S223676; *People v. Valencia* (2014) 232 Cal.App.4th 514, review granted February 18, 2015, S223825; *People v. Guzman* (2015) 235 Cal.App.4th 847, review granted June 17, 2015, S226410; *People v. Davis* (2015) 234 Cal.App.4th 1001, review granted June 10, 2015, S225603; *People v. Sledge* (2015) 235 Cal.App.4th 1191, review granted July 8, 2015, S226449; *People v. Myers* (2016) 245 Cal.App.4th 794, 799-805, review granted May 25, 2016, S233937.

of Section 667." (§ 1170.18, subd. (c).) Although this provision states that the definition applies "throughout [the Penal] Code," the apparent purpose of a statute will not be sacrificed to a literal construction. (*Cossack v. City of Los Angeles* (1974) 11 Cal.3d 726, 732.)

In construing this statutory language, the fundamental rule of statutory construction requires this court to "'"'ascertain the intent of the Legislature so as to effectuate the purpose of the law." [Citations.] Statutes should be construed so as to be given a reasonable result consistent with the legislative purpose.' [Citation.]" (*People v. Cossack*, *supra*, 11 Cal.3d at pp. 732-733.) In doing so, "'[t]he court should take into account matters such as context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, and contemporaneous construction.'" (*Id.* at p. 733, quoting *Alford v. Pierno* (1972) 27 Cal.App.3d 682, 688.)

None of these relevant considerations suggest that in enacting Proposition 47 the voters intended to modify the provisions of Proposition 36. Proposition 47 reflects a policy of requiring courts to resentence all qualified misdemeanants, unless they are likely to commit a super-strike. Proposition 36, by contrast, grants trial courts broad discretion to determine whether an inmate otherwise eligible for resentencing "would pose an unreasonable risk of danger to public safety." There is a significant difference between a defendant who has multiple prior serious and/or violent felony convictions and a current misdemeanor conviction (or it would be under current law), and someone whose current offense is a felony. Therefore treating the two groups differently for resentencing

purposes does not lead to absurd results, but rather is reasonable.

Furthermore, nowhere in the ballot materials for Proposition 47 was it called to voters' attention that the definition of the phrase contained in section 1170.18, subdivision (c), would apply to Proposition 36 resentencing proceedings. And nowhere do the Proposition 36 ballot materials suggest the electorate intended to open the prison doors to existing third strike offenders in all but the most egregious cases, which would, in effect, ensue if the Proposition 47 definition of "unreasonable risk of danger to public safety" is applied to Proposition 36 resentencing under section 1170.126, subdivision (f). Applying Proposition 47's definition of what constitutes such a risk to a resentencing under Proposition 36 would frustrate rather than promote the intent of the electorate. We therefore reject defendant's contention that Proposition 47 altered Proposition 36 in that respect.

Accordingly, Proposition 47 has no effect on defendant's petition for resentencing under Proposition 36. Defendant is not entitled to resentencing on count 1 under Proposition 36, based on the Proposition 47 definition of "unreasonable risk of danger to public safety." The trial court appropriately disregarded Proposition 47's narrow, super-strike based standard when deciding defendant's Proposition 36 resentencing petition.

IV

INSUFFICIENCY OF EVIDENCE DEFENDANT POSES AN UNREASONABLE RISK OF DANGER TO PUBLIC SAFETY

Defendant alternatively contends that, even assuming the Proposition 47 definition of unreasonable danger to public safety does not apply, the trial court's denial of his

resentencing petition constituted an abuse of discretion because defendant did not pose an unreasonable risk of danger to public safety. Defendant argues that his prior strikes were unrelated to any homicidal or sex-offense behavior. He notes his 1997 offenses were nonserious and nonviolent, and his 2000 first-degree robbery and burglary offenses were also unrelated to homicidal or sex offenses. Defendant further argues his crimes committed while incarcerated do not indicate he is an extraordinary risk to society.

We conclude the court did not abuse its discretion in finding that resentencing defendant under Proposition 36 would present an unreasonable risk of danger to public safety. Under the Three Strikes Law as it existed before enactment of Proposition 36, a defendant convicted of two prior serious or violent felonies was subject to a minimum sentence of 25 years to life upon conviction of any third felony. Proposition 36 reduces punishment for certain offenders whose current convictions are not serious or violent. Defendants currently serving an indeterminate sentence for a third felony conviction that is neither serious nor violent may petition for resentencing under Proposition 36, as a second-strike offender, and seek a determinate term. (§ 1170.126.)

Under Proposition 36, the trial court shall resentence a petitioner who meets the statutory criteria, "unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) We review such determinations for an abuse of discretion. (*People v. Flores* (2014) 227 Cal.App.4th 1070, 1075.) "Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary,

capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

In the instant case, the trial court properly exercised its discretion in denying defendant's petition seeking resentencing as a second-strike offender. In exercising its discretion, the trial court may consider "[t]he petitioner's criminal conviction history," "disciplinary record," and "[a]ny other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1170.126, subd. (g)(1)-(3).)

The record shows that the trial court considered each factor and the court's findings are amply supported by the record. This is apparent from the trial court's statements made during the hearing on defendant's resentencing petition. The court initially stated during the hearing: "[W]e have his priors starting in 1976, robbery, PC 245 and 217. 1981, 211. Armed. 1981, felon in possession of a firearm. 1982, bank robbery. [¶] Then our case. Actually, chronologically, I think the L.A. case probably occurred first. The robbery and burglary with firearms. Then our case, 273.5. And then in reviewing the C file, we have 2000 – July, 2012, battery on an inmate. 2009, battery on an inmate. 2007, battery on an inmate. 2005, battery on an inmate."

After hearing oral argument, the trial court further stated: "Well, in looking at his prior history, ignoring the juvenile offenses, in 1976 through the '80s, we have robberies and guns. He was in prison for a while during that time. [¶] Then we have the robberies and burglaries with guns in Los Angeles. [¶] We have the 273.5 here. And then once in prison we have fights and batteries on inmates. I think there's an ongoing pattern that

doesn't appear to be broken. [¶] You know, if we had some batteries or fights when he was first committed to state prison in 2000, 2002, 2003, and then nothing for the last ten or twelve years, I might be persuaded that he's kind of over that violence. [¶] But that doesn't appear to be the case. [¶] So, the Court is satisfied at this point that Mr. Hernandez continues to pose an unreasonable risk of dangerousness to the community. And, therefore, the petition for resentencing pursuant to Proposition 36 . . . is denied."

The trial court appropriately denied defendant's Proposition 36 resentencing petition based on defendant's criminal conviction history and disciplinary record, which supported a reasonable finding that "resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) There was no abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 375, 376-377.)

V

DISPOSITION

The trial court order denying defendant's Proposition 36 petition for resentencing is affirmed.

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CODRINGTON
J.

We concur:

HOLLENHORST
Acting P. J.

MILLER
J.